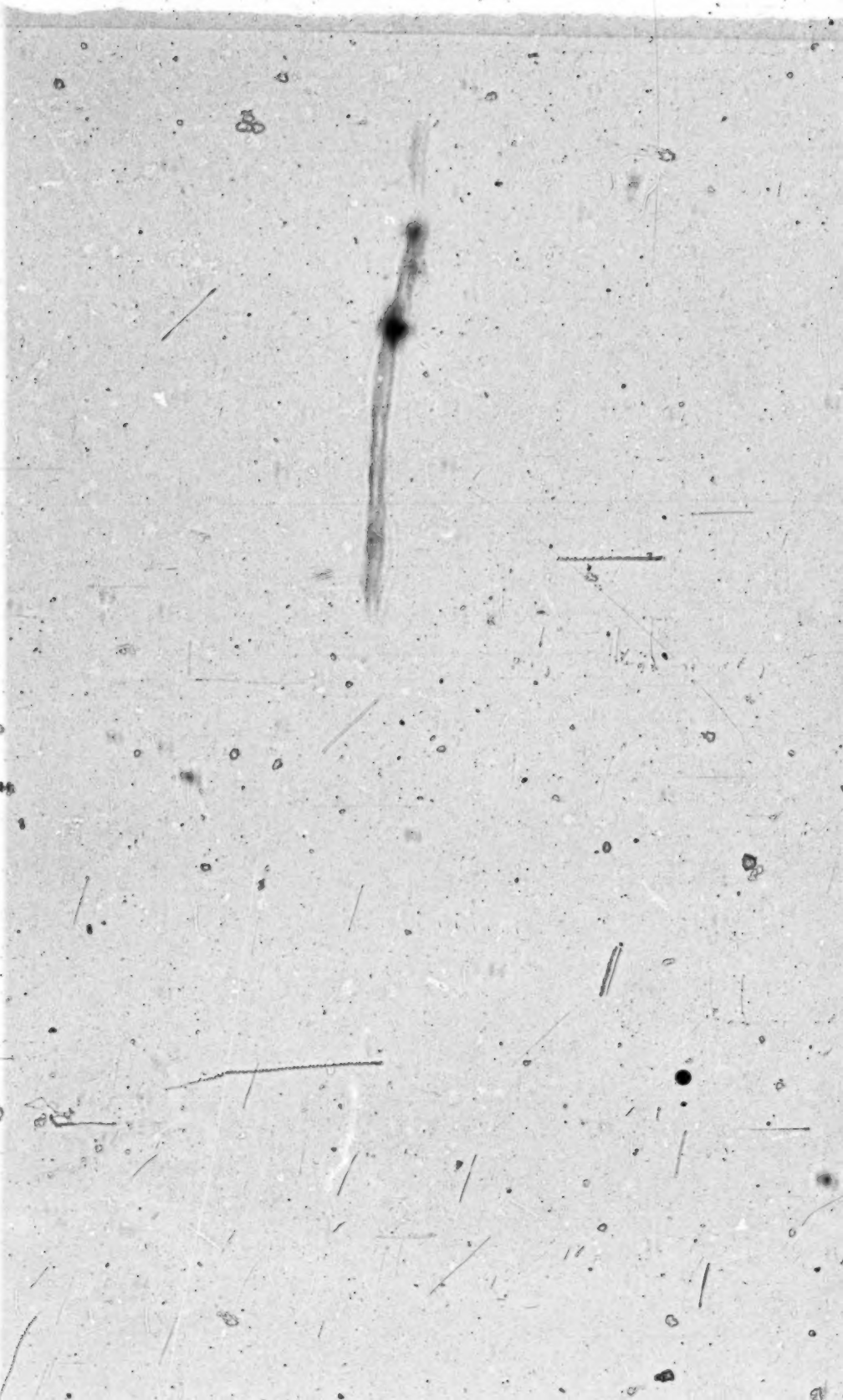

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 361

ARMAND EDWARD BLACKMAR,

Petitioner,

versus

L. F. GUERRE, MANAGER, VETERANS ADMINISTRATION REGIONAL OFFICE NO. 3021, NEW ORLEANS, LOUISIANA AND UNITED STATES CIVIL SERVICE COMMISSION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. Certiorari Granted November 26, 1951.

SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RENÉ R. NICAUD,
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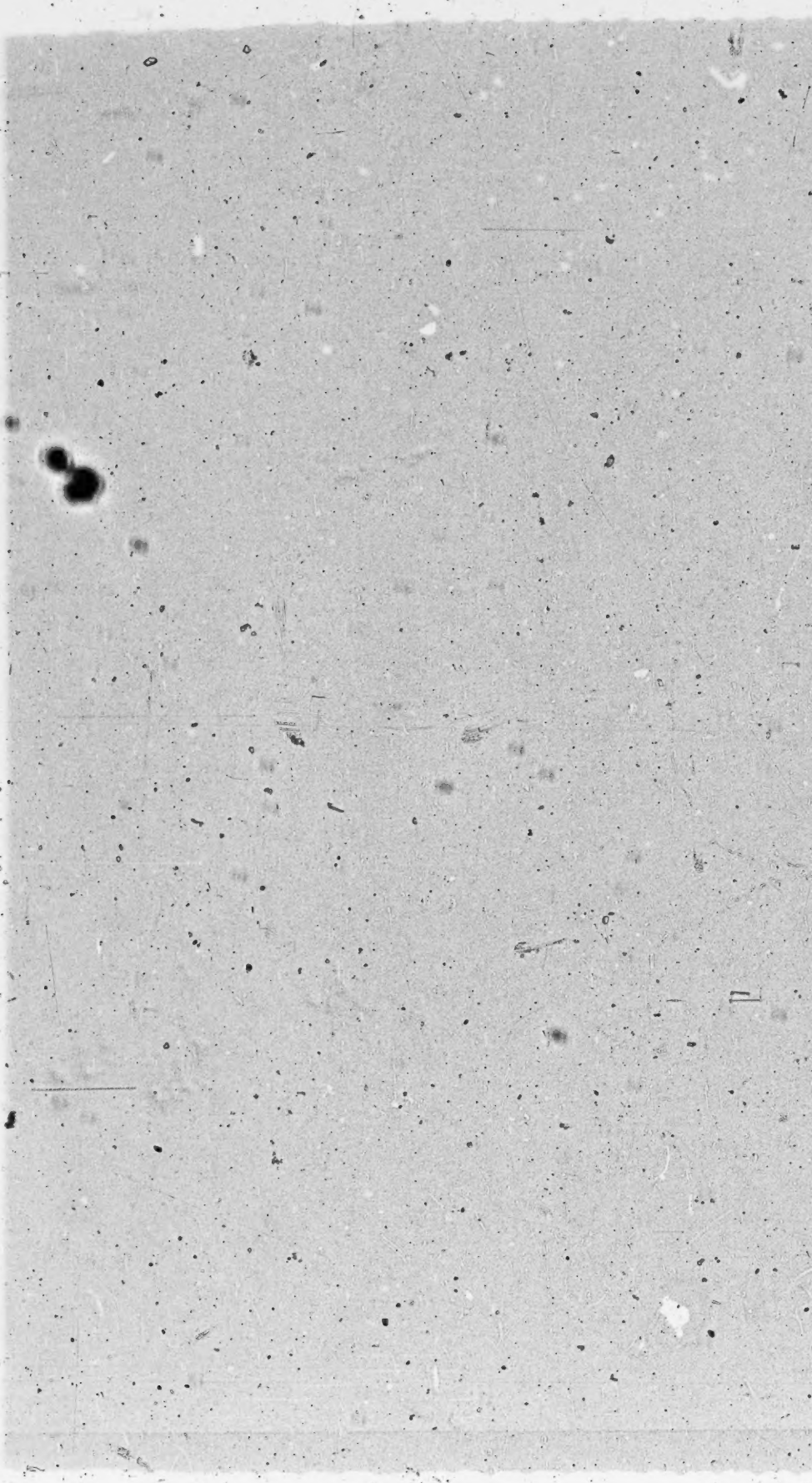
HAUSER PRINTING CO., INC., NEW ORLEANS



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This brief is supplementary to the argument and authorities stated in the petition for certiorari.[1]

The government in its brief in opposition to the petition for certiorari urges that the District Court be-

[1] The expense of this litigation has already been substantial. In view of the limited finances of petitioner, we trust the Court will excuse our not repeating herein the original argument and authorities. They are, of course, to be considered first and as though reiterated herein.

low lacks jurisdiction because of some decisions to the effect that the United States District Courts, other than the District of Columbia, do not have authority to entertain original proceedings in mandamus. Neither the District Court, nor the Circuit Court of Appeals agreed with that position. Their decisions were not based on that ground, but on lack of venue.[2]

Independent of the Administrative Procedure Act, under their general jurisdiction, the United States District Courts have the right to review Administrative proceedings where the violations of a mandatory provision of law are involved and a personal right of the plaintiff has been infringed by such violation. *Stark vs. Wickard*, 321 U.S. 288, 64 S. Ct. 559. This is so although one of the remedies sought may be in the nature of mandamus. The present action is not an original suit in mandamus and jurisdiction is not dependent on such process. However, whatever doubt or confusion may have existed previously, it is clear now that under the provisions of Section 10, 5 U.S.C.A. 1009 of the Administrative Procedure Act, the District Courts not only have the right to review Administrative proceedings, but this section directly recognizes the common

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[2] It should be noted also that the Court of Appeals, consistent with its decision in *Bradley Lumber Company of Arkansas, et al v. National Labor Relations Board*, 84 F. 2d 97, recognizes that the Civil Service Commission is an entity distinct from its members. It is in the nature of a government corporation. *Texas & P. R. Co. vs. Interstate Commerce Commission*, 162 U. S. 197, 16 S. Ct. 666, 669, and like the United States is not centered in any place and concepts of residence and principal place of business have no relevancy. If we are to apply such concepts at all, however, then under the provisions of 28 U. S. C. A. 1391 (c), venue would be in the Eastern District of Louisiana, in view of the extensive operations of the Commission in that District. Further both by its operations and conduct in this case, the Commission has waived its objection to venue (pet. p. 16). The privilege of venue may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct. *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U. S. 165, 60 S. Ct. 153; *Industrial Addition Ass'n v. Commissioner of Internal Revenue*, 323 U. S. 310, 65 S. Ct. 289.

law actions "for declaratory judgments or writs of prohibitory or mandatory injunctions * * *", as appropriate methods of judicial review. Under this section the authority of the Court includes, if necessary, the express authority "to compel agency action unlawfully withheld" and to issue prohibitory or mandatory writs: *Kristensen vs. McGrath*, 179 F. 2d 796; *U. S. ex rel Trinler vs. Carusi*, 166 F. 2d 457; *United States ex rel Cammarata vs. Miller*, 79 Fed. Sup. 643; and *Fisher vs. Haeberle*, 80 Fed. Sup. 126. These rulings are in accord with the decisions of this Court construing the Administrative Procedure Act, *United States vs. Morton Salt Co.*, 338 U.S. 632, 70 S. Ct. 357; *Wong Yang Sung vs. McGrath*, 339 U.S. 33, 70 S. Ct. 445, and *Universal Camera Corp. vs. National Labor Relations Board*, 340 U.S. 474, 71 S. Ct. 456. To hold otherwise is to emasculate this statute for in almost every case of administrative review the enforcement of the decree would compel the agency to do what it had previously been unwilling to do.

Even if the District Court below could not grant mandatory relief, it would nevertheless have had jurisdiction to review the administrative proceedings and to have rendered a declaratory judgment as to the validity of the proceedings and as to petitioner's rights. 5 U.S.C.A. 1009 (b), 28 U.S.C.A. 2201, 2202. The Declaratory Judgment Act has enlarged the remedies available in Federal District Courts. *United Public Workers vs. Mitchell*, 330 U.S. 75, 67 S. Ct. 556; *Skelly Oil Co. vs. Phillips Petroleum Co.*, 339 U.S. 667, 70 S. Ct. 876; *McGrath vs. Kristensen*, 340 U.S. 162, 71 S. Ct. 224.

The term "civil action" as used in 28 U.S.C.A. Sec. 1346, providing for the original jurisdiction of the District Courts of suits against the United States, includes

any suit or claim against the United States if it is within the amount limitation and not within the exceptions therein expressly stated. "The reach of 'any civil action' is unmistakable." *Ex Parte Collett*, 337 U.S. 55, (p. 58) 69 S. Ct. 944, (p. 946).

The point raised by the government on page 8 of its brief, footnote 4, that petitioner is "an officer" of the United States and therefore under 28 U.S.C.A., Section 1346 (d) (2), the District Court does not have jurisdiction of his action, was never made before by the government in this case. It makes its first appearance in the government's Supreme Court brief. There is no substance to this contention. In his complaint petitioner alleged that he was an employee of the government (Art. 1, R. 6; Art. 5, R. 7) and the government admitted this fact in its answer (R. 17 and R. 18, Arts. 5 and 6). The government is bound by the admissions in its pleadings and should not be permitted to reverse its position by the belated injection of such an issue at this stage of the case. Actually, however, petitioner was not an officer of the United States since he did not hold his position by appointment of the President, the Courts of law, or any head of department under Article 2, Section 2 of the United States Constitution.[3]

With respect to the alternative position of petitioner that if the District Court below is correct in its position

[3] This point has been well settled since 1879 when the leading case of *United States v. Germaine*, 99 U. S. 508, was decided by this Court. Also *Burnap v. U. S.*, 252 U. S. 512, 40 S. Ct. 374, *Scully v. U. S.*, 193 F. 185. The amendment of October 31, 1951, to Sec. 1346 (d) (2) so as to include "employees" within the purview of this exception, therefore, effects a radical change in the existing law. The quoted statement (fn 4 of p. 8 Rep. brief) from the Congressional Record is incorrect and very misleading. This amendment may be another example of "The Erosion of the Administrative Procedure Act." See the excellent article under this title by Charles S. Rhyne in the September 1951 issue of the American Bar Association Journal.

that it did not have venue, it should have transferred rather than dismissed, the case, both the Circuit Court of Appeals in its decision and the government rely on the case of *Foster-Milburn Co. vs. Knight*, 181 F. 2d 949 (C.A. 2) and *Shapiro vs. Bonanza Hotel Co.*, 185 F. 2d 777 (C.A. 9). These cases conflict with the holding of the Ninth Circuit Court of Appeals in the case of *Paramount Pictures vs. Rodney*, 186 F. 2d 111, cert. den. March 26, 1951, 340 U.S. 953, 71 S. Ct. 572. Note also, *Otto vs. Hirl*, (D.C. Iowa, 1950) 89 Fed. Sup. 72. The latter cases correctly construe the transfer provisions of the Judicial Code and under these decisions it is clear that the Court below should in no event have dismissed the suit. Further the fact that the Civil Service Commission (the only indispensable party in the government's view of the case) is amenable to service in the District of Columbia distinguishes the instant case from the *Foster-Milburn Co. vs. Knight* and *Shapiro vs. Bonanza Hotel Co.*, cases.

In view of the argument and authorities presented in the Petition for Certiorari, as supplemented by the foregoing, it is respectfully submitted that the decision of the Circuit Court of Appeals and of the District Court should be reversed.

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January 1952.